REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO. 2188 OF 2016

KENYA UNION OF HAIR AND BEAUTY WORKERS.....CLAIMANT

VERSUS

TRENZ KENYA LTD.....RESPONDENT

RULING

1. The Claimant by application dated 26th October, 2016 brought under the provisions of article 41 of the constitution, section 74(3), 8(8) of the Labour Relations Act and section 12 of the Employment and Labour Relations Court Act and seeking for orders that;

> *The court be pleased to direct and order the Respondent from hiring new employees until this case is heard and determined.*
>
> *The court be pleased to order and direct the Respondent to reinstate all workers/members who were terminated as a result of the alleged lock out/strike just after they had joined the union until the hearing and determination of this case.*
>
> *The court be pleased to order the Respondent from victimising, intimidating and harassing the workers until the hearing and determination of this case.*
>
> *The court be pleased to order and direct the Respondent to sign a recognition agreement with the Claimant union forthwith.*

2. The application is supported by the annexed affidavit of Cecily Mwangi on the grounds that the Claimant union has recruited simple majority of the required employees in the Respondent business in terms of section 54 of the Labour Relations Act to enjoy recognition by the Respondent with 42 out of the 60 total unionisable workers as members. The Claimant has engaged the Respondent in several meetings to sign a recognition agreement but failed. As a result of forwarding the check off forms to the Respondent and asking for a meeting to sign the recognition agreement the Respondent proceeded to terminate the union members on an alleged strike. These employees were expressing their desire to have proper representation by the union on an issue the Respondent was resisting. This was the genesis of the alleged strike/lock out and by extension, the failure by the Respondent to recognise the clamant union.

3. In her affidavit, Ms Mwangi avers that as the Claimant general secretary and union has made effort to organise the recruit members within the Respondent and have attained 50% plus in accordance with the law. Upon writing to the Respondent with check off forms and for recognition and the Respondent has not obliged. On 14th October, 2016 an officer from the labour office invited both parties to a joint meeting to resolve issues in dispute and to sign recognition agreement but the Respondent failed to respond.

4. Another meeting was scheduled and held on 17th October, 2016 to address the lock out and dismissal of Claimant members but the meeting had a deadlock and certificate of disagreement was issued. The Claimant has attained a simple majority with the Respondent and warrant recognition. The Respondent is now engaging in unfair labour practices in terminating unionised members, harassment and issuing short term contracts for employees with more than 8 years of service.

5. In reply, the Respondent filed Replying Affidavit sworn by Ezekiel Mutuku the human resource manager of the Respondent and avers that upon the incorporation of the Respondent by its directors in 2005. The core business of the Respondent is the production of synthetic hair additions and whereas the company has been in operation it has never posted profits in any year. To meet operational costs and salaries the Respondent has had to borrow from outside sources to avoid closing down and thus job losses. The current objective is to keep the business alive and sustain the employees.

6. The Respondent has maintained fair labour relations but on 28th September, 2016 information was received that the Claimant was recruiting employees and on 6th October, 2016 a letter was received from the Claimant seeking for a meeting so as to sign a recognition agreement.

7. On 13th October, 2016 the Mr Mutuku noticed the employees were not working and refused to attend work unless a meeting scheduled with the Claimant for 14th October, 2016 was confirmed. Since this was a sudden development the Respondent wrote to the Claimant seeking to know details of the check off forms and assured employees to return to work but they downed their tools and demanded that they could not return to work until the recognition agreement was signed. Despite spirited persuasion to resume work the employees walked out vowing not to work unless the scheduled meeting was confirmed. At 2pm the employees were served with termination letter and the Labour Officer dully informed. All salaries due up to October, 2016 have been paid.

8. In April, 2016 the stock for synthetic fibre got finished and the company did not have raw materials to enable further production. From mid-May, 2016 a substantial employees were sent on paid leave since there were no operations on-going. In June, 2016 the Respondent was only operating with skeleton staff due to lack of raw materials. For employees with expiring contracts, they were kept on short term contracts ending 30th October, 2016 due to lack of raw materials and cash flow challenge. The Respondent was committed to renew the contracts once there was raw materials.

9. The decision to go on an illegal strike was totally unjustified in the circumstances. With the employment contracts ending on their terms and payment having been effected the orders sought cannot issue. The Respondent has not been able to recruit new employees

10. Both parties filed written submissions.

Determination

11. Putting into account the application by the claimant, the affidavits in support of each case for the Claimant and the Respondent and the written submissions, the core at the application is the recognition of the Claimant union. Also the right of the Claimant members in the employment of the Respondent being allowed to join the union and the rights that go with it. These are matters and issues that can simultaneously be addressed.

12. On the orders sought that the Respondent should recognise the Claimant who has attained the requisite threshold for the same, such can only be verified on set facts and principles required for recognition in accordance with section 54 of the Labour Relations Act. This is not a matter that can be fully addressed as an interim measure and by affidavits. Submissions on requisite numbers of unionisable employees of the respondent, the numbers that have joined the Claimant membership and the requirements set out in law for adherence by the Respondent as a prerequisite before he court can direct the Respondent to recognise the Claimant union.

13. The Claimant is also seeking for orders that pending the hearing of the claim that the employee terminated following the strike/lockout be reinstated back into employment with the respondent. The Respondent in reply to the same has set out a series of events that they have been low on business since April, 2016, been forced to send employees on paid leave due to lack of raw materials and the employees were then put on short term contracts ending 30th October, 2016 which have lapsed and owing dues paid. As such, there is no work and the term contracts have since come to an end.

14. Section 54(3) of the Labour Relations Act provides that;

> *(3) An employer, a group of employers or an employer's organisation referred to in subsection (2) and a trade union shall conclude a written recognition agreement recording the terms upon which the employer or employers' organisation recognises a trade union.*

15. The recognition of a trade union by an employer is regulated in terms of set principles – the union has attained simple majority, the union operates within the sector of the employer business, and that the union is the right and appropriate union for the unionisable employees within the given business and has the constitution that spells out such mandate. Where there is a dispute as to the question of recognition of a union by an employer, recourse is to the court in terms of section 77 of the Labour Relations Act and not for the employees and members of the trade union to engage in strike so as to put pressure upon the employer to give recognition. To do so would put the employment of such employee into jeopardy and any subsequent strike on such rationale would only end up as being unprotected. See **Teachers Service Commission versus KNUT & another [2012] eKLR.**

16. Averments by Mr Mutuku for the Respondent that employees downed their tools when the meeting scheduled for 14th October, 2016 could not be confirmed is not contested. The orders sought by the Claimant in this regard are set out as *that the court should order for the reinstatement of the employees terminated following a strike/lock out* and without clarification as the facts leadings to the strike and or lock out, to issue interim orders as set out by the Claimant would be to deny the court crucial evidence and material in ascertaining the merits of the facts from either party.

17. unions are duty bound to discourage strikes and any breaches of law by workers as was established in the authority of **Mohamed Yakub Athman & 29 others versus Kenya Ports Authority (2016) eKLR** that;

> *Unions shall discourage any breach of the peace or civil commotion by their members; and every employee has the right to approach management on grievances, but such grievances should not be communicated violently. Grievances should be handled through the existing industrial relations machinery…Trade Unions representing Employees must be involved from the beginning, before resort to any industrial action. There is no place in our Constitution for outlaw strikes.*

18. Reinstatement is a final order that the court can award upon hearing both parties on their merits. However, where there are exceptional circumstances the court has the mandate to address the same and deal as appropriate. In **Anthony Njue John versus National Bank of Kenya, Cause No.1278 of 2014** the court held that;

> *The remedy of reinstatement is available to an employee unfairly treated by the employer in terms of the parameters set out under section 49 of the Employment Act. Such a remedy is given in exceptional cases and in a situation where such would adequately address an employee who has been visited with grave injustice.*

19. The exceptional circumstances that prevail for an applicant to seek the order of reinstatement must be demonstrated by the applicant. The court in **Paul Nyandewo Onyangoh versus Parliamentary Service Commission & Others, Cause No.2292 of 2016** the court in reference to other referenced cases on the subject of addressing the issue of reinstatement in the reinstatement held that Certain forms of termination grounds, the kind that result in automatically unfair termination such as pregnancy, race, gender or religious discrimination, may warrant the rare exercise of the Court's discretion in issue of interim

reinstatement. This is more so particularly under the new liberal Constitution of Kenya, which frees the hands of the Courts in administration of justice.

20. The Claimant vide supporting affidavit of Cecily Mwangi has not offered any material in support of this prayer/order. Emphasis was only given in terms of the issue of recognition and no more. To thus allow reinstatement in the interim on the material before court would not meet the ends of justice as to do so without the establishment of the special circumstances of the Claimant members would deny the Respondent vital material evidence with regard to the same.

21. On the matters set out by the Respondent that the Claimant members now terminated were on fixed term contracts which has since lapsed, the Claimant does not offer any reply to these facts. It is therefore not contested that indeed the subject employees alleged to have been terminated following the strike/lock out are no longer the employees of the respondent.

22. At this stage, to delve into these facts would be to deny the Respondent this vital evidence to be articulated on its merits as well as to deny the Claimant the vital chance to assert its case at the full hearing.

23. On the orders sought by the claimant, putting into account the above analysis, such cannot issue in the interim.

Accordingly, the application dated 26th October, 2016 is hereby declined. Costs in the cause.

Dated, signed and read in open court this 24th day of May, 2017.

M. MBARU

JUDGE

In the presence of:

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